

2
No. 84-755

Office - Supreme Court, U.S.

FILED

MAR 5 1985

ALEXANDER L. STEVAS

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

PETER M. HORSTMAN
Federal Public Defender
Suite 1503, United States Courthouse
312 North Spring Street
Los Angeles, California 90012-4758
(213) 688-6044
Counsel for Respondent

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Petitioner

PETITION FOR A WRIT OF CERTIORARI FILED NOVEMBER 8, 1984
CERTIORARI GRANTED JANUARY 21, 1985

69 pp

TABLE OF CONTENTS *

	Page
Relevant Docket Entries	1
Indictment	3
Transcript of Proceedings, Hearing on Motion to Suppress, April 25, 1983	5
Declaration of Kyle E. Windes	39
Affidavit of Kyle E. Windes	41
Order Directing Performance of X-ray Examination...	44
Declaration of Jose Angel Serrato	46
Declaration of Marilee S. Morgan	49
Declaration of Jerome Gonzales	52
Declaration of Teodora A. Mendoza	57
Trial Stipulation	60
Order Granting Certiorari	66

* The oral ruling of the district court denying the motion to suppress and the decision of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-5125

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1983	
June 21	DOCKETED CAUSE and Entered Appearances of Counsel
Dec. 31	As of Dec. 8, Argued and Submitted Before: GOODWIN, TANG CJJ; JAMESON (MONTANA) DJ
1984	
Apr. 24	Filed Per Curiam Opinion—Reversed
Apr. 24	Filed and Entered JUDGMENT
Aug. 10	Filed Order (GOODWIN, TANG, JAMESON). The petition for rehearing is denied and the Suggestion for rehearing en banc is rejected.
Sept. 19	Filed Order (Goodwin, TANG, JAMESON). The motion to stay issuance of the mandate of this court pending the filing of a petition for certiorari with the United States Supreme Court is GRANTED. Issuance of the mandate is stayed until Oct. 16, 1984.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

CR-83-00215-01
Criminal Dockets

UNITED STATES

v.

HERNANDEZ, ROSA ELVIRA MONTOYA DE

Judge: Judge Gray

Case filed 03/11/83

DATE	EVENT
3/5/83	Defendant arrested
3/11/83	Filed magistrate complaint; Defendant's first appearance; Arraignment on magistrate complaint held
3/18/83	Filed indictment
3/28/83	Arraignment held
4/13/83	Motion to suppress evidence filed
4/25/83	Motion to suppress evidence hearing held
4/25/83	Motion to suppress evidence denied
4/26/83	Filed waiver of jury trial; Trial begins—bench; trial ends—bench; Court Judgment of guilty
6/6/83	Sentencing of defendant
6/10/83	Filed Notice of Appeal

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

March 1983 Grand Jury

CR 83-215

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ, DEFENDANT

[21 U.S.C. § 841(a)(1): Possession with Intent to Distribute Narcotic Drug Controlled Substance; 21 U.S.C. §§ 952(a); 960(a)(1): Importation of Narcotic Drug Controlled Substance]

INDICTMENT

The Grand Jury charges:

COUNT ONE

[21 U.S.C. 841(a)(1)]

On or about March 5, 1983, in Los Angeles County, within the Central District of California, defendant ROSA ELVIRA MONTOYA de HERNANDEZ knowingly and intentionally possessed with intent to distribute approximately 660 grams of cocaine, a Schedule II narcotic drug controlled substance.

COUNT TWO

[21 U.S.C. 952(a), 960(a)(1)]

On or about March 5, 1983, in Los Angeles County, within the Central District of California, defendant

ROSA ELVIRA MONTOYA de HERNANDEZ knowingly and intentionally imported approximately 660 grams of cocaine, a schedule II narcotic drug controlled substance, into the United States from Bogota, Colombia, in violation of Title 21, United States Code, Sections 952(a) and 960(a)(1).

A TRUE BILL

Foreperson

STEPHEN S. TROTT
United States Attorney

TRANSCRIPT OF PROCEEDINGS

[3] LOS ANGELES, CALIFORNIA;
MONDAY, APRIL 25, 1983; 2:55 P.M.

THE CLERK: Item No. 22, CR 83-215, U.S.A. vs. Rosa E.M. de Hernandez, on calendar for defendant's motion to suppress evidence and statements; and defendant's motion to dismiss.

MS. LEVINE: Good afternoon, your Honor. Janet Levine on behalf of Rosa Elvira Montoya de Hernandez, who is present.

Your Honor, also present is Ely Weinstein, a court certified interpreter.

THE COURT: All right. Good afternoon, ladies. Just be seated, please.

Mr. NIESEN: Good afternoon, your Honor. Jeffrey Niesen for the United States.

THE COURT: Are we going to have testimony in this case?

MS. LEVINE: Brief testimony, your Honor. I would imagine that the testimony would be only on the suppression motion, and would last a total of approximately an hour. But I do think there are certain points that must be brought out. An hour, including argument, your Honor.

THE COURT: Call the Ashkenazy case.

(Other brief matter heard)

[4] THE COURT: Is it the motion to suppress that you want to have testimony on?

MS. LEVINE: No, your Honor. Just the motion to suppress.

THE COURT: May the declaration by the government's witnesses be deemed as direct evidence, subject to cross-examination?

MS. LEVINE: Your Honor, with the exception of a few lines which I would intend to move the Court to strike

at the beginning of each witness' testimony, yes, they may be admitted.

THE COURT: Whom do you want to cross-examine?

MS. LEVINE: Your Honor, I would like to cross-examine Inspector Serrato—everybody who has submitted a declaration, in essence, your Honor, although some will be quite brief, approximately two to three minutes each.

THE COURT: Is there anything that the government wants to put on in supplementing your declarations?

MR. NIESEN: Yes, your Honor. I have submitted a written stipulation to Counsel. I don't know whether it's been signed yet.

MS. LEVINE: Your Honor, it was just read in Spanish to Ms. de Hernandez, who signed it, and I will be [5] signing it. This goes to the Rule 5 motion, and it has been signed.

THE COURT: All right.

MS. LEVINE: May I approach Counsel?

THE COURT: Of course.

MR. NIESEN: With respect to the motion to suppress, Your Honor, the United States will rest on the declarations prepared.

THE COURT: What first witness do you want?

MS. LEVINE: Your Honor, I'd like to first call Inspector Serrato, and I'd like the other witnesses to be excused.

THE COURT: I think they have already left.

MS. LEVINE: Thank you.

THE COURT: Is somebody calling him?

MR. NIESEN: Yes, your Honor.

JOSE A. SERRATO,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

MS. LEVINE: Your Honor, with this witness, on his declaration, paragraph 6, the last sentence—that's lines

23 to 24—contains hearsay in the extent it says that "we both acknowledged," talking towards Inspector Talamantes; and I would move to strike only [6] that sentence of the declaration that contains hearsay.

THE COURT: Well, let's see. This statement, to the extent that this statement acknowledged or agreed or asserted that she fits the profile, that's his expression of opinion, which I will accept.

If Mr.—who is the other man? Who is the other part of the "we"?

MS. LEVINE: Talamantes, your Honor.

THE COURT: Mr. Talamantes presumably expressed that belief also, which could be the basis for this man's acting.

I'll deny the motion.

MS. LEVINE: Very well, your Honor.

THE CLERK: May I ask the witness to state his full name, and spell his last name for the record.

THE WITNESS: Jose A. Serrato, S-e-r-r-a-t-o.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Inspector Serrato, before a passenger arrives at your station in Customs, they are cleared through Immigration. Is that correct?

A. Yes.

Q. Immigration checks the passenger's documentation; correct?

[7] A. Yes.

Q. With an alien, the passport and visa are checked; correct?

A. Pardon me. I didn't understand.

Q. The passport is checked by Immigration, isn't it?

A. Yes.

Q. And the visa is checked also.

A. Yes.

Q. If everything is in order there, the passport is stamped and admitted; right?

A. Yes.

Q. The visa is also stamped.

A. No.

Q. The I94 is stamped admitted; right?

A. Yes.

Q. An I94 is an Immigration document; right?

A. Yes.

Q. The passenger is then referred to Customs; correct?

A. Yes.

Q. On March 5th, 1983, Mrs. de Hernandez was referred to you in Customs; right?

A. Yes.

Q. For a Customs inspection; correct?

[8] A. Yes.

Q. She presented her passport to you; correct?

A. Yes.

Q. Included in the passport was her I94 document; right?

A. Yes.

Q. You examined the passport, didn't you?

A. Yes.

Q. The passport and the I94 were both stamped admitted, weren't they?

A. Yes.

MS. LEVINE: Your Honor, I have two exhibits that the clerk asked me to hold until trial.

THE COURT: All right.

MS. LEVINE: I would like this exhibit marked Defense 101 for identification and placed before the witness.

THE COURT: Is there any doubt but that she did pass through immigration with a valid passport?

MR. NIESEN: Your Honor, the government will stipulate that she cleared through Immigration on a Colombian passport.

MS. LEVINE: Very well. I move the passport [9] into evidence, Your Honor.

MR. NIESEN: I have no objection.

THE COURT: All right. It may be received.

THE CLERK: It will be marked Exhibit A.

(Defendant's Exhibit 101 marked for identification and received in evidence.)

BY MS. LEVINE:

Q. After you asked Mrs. de Hernandez some questions, you examined her luggage; correct?

A. Yes.

Q. She had a suitcase with her; right?

A. Yes.

Q. She had a purse with her; right?

A. Yes.

MS. LEVINE: Your Honor, the government and I have entered a stipulation as to the contents of the purse and the luggage, so as not to take up much of the Court's time. It would be an oral stipulation. It hasn't been written, but I present it to the Court as follows:

"The United States of America, by Jeffrey Niesen, Assistant United States Attorney, and defendant Rosa Elvira Montoya de Hernandez, by and through her lawyer Janet I. Levine, hereby stipulate as follows:

[10] "Ms. de Hernandez' purse, at the time that she came into Customs, contained the following: a make-up bag containing lipstick, mascara, rouge, mirror, eye liner, and eye shadow; a purse containing perfume, hand cream, toothbrush, toothpaste, hairbrush, handkerchief, pictures of two children, a pen, and some U.S. currency;

"A suitcase containing nightgown, a 500-peso note, a pair of jeans, three blouses, three pairs of slacks, one green two-piece suit, assorted bras, panties and socks, two sweaters, and a brown skirt."

That would be the stipulation, your Honor.

MR. NIESEN: The United States will stipulate to that.

THE COURT: All right.

What's the burden of your contention, Ms. Levine?

MS. LEVINE: Your Honor, the point I'm trying to make in this motion is that Ms. de Hernandez came into the United States, she was examined by the Customs inspector, Inspector Serrato, and he examined her luggage; and at that point, he had her pat-searched, and he had her strip-searched, and nothing was found.

Further, he asked her to consent to an X-ray search. She did not consent.

[11] THE COURT: Yes.

MS. LEVINE: Then he asked to get a court order. The agent did not get a court order. At that point, there was no clear indication or any cause to hold her.

THE COURT: Not probable cause.

MS. LEVINE: Not clear indication, your Honor. Clear indication is—

THE COURT: How could there be a clear indication if the officer suspects that she's carrying something in her alimentary canal?

MS. LEVINE: Generally, the cases finding clear indication note the following, which aren't noted in this case:

The individual walks in an unusual or strained manner—that would be in Shreve, your Honor; there is a lubricant of some kind; or there is some information—

THE COURT: I'm never going to be able to assert that these fellows did not have a valid ground for suspicion. Not probable cause, but under the circumstances of this case, when, A, she comes in from Colombia; that of itself is of little significance. She has been here four times before, either to Miami or LAX. She appeared nervous. She did not know where she got her airline ticket. She knew no one here. She was coming in [12] here to buy things for her husband's store at retail stores.

I think that is enough to have a strong suspicion that she may be carrying something.

Now, the only way possible to find that out is to take an X-ray; and if she refuses the X-ray, I'm prepared to

hold that the government had a right to refuse to allow her to come in and to send her home on the next plane.

MS. LEVINE: Your Honor, I would state the following: First, Ms. de Hernandez—which I will elicit from Mr. Serrato—came into the country with receipts with her name on them, showing past buying trips at retail outlets at the time she was in the country.

Second, your Honor, there is no declaration that states that she was nervous.

THE COURT: I read that in one of the declarations, I believe.

MS. LEVINE: Your Honor, it is in the facts, but in no declaration. It's attached to the affidavit to get the warrant.

THE COURT: Ms. Levine, I'm not going to require these fellows, with that suspicion, to send her out into the community, under the circumstances that are in the declaration. If it isn't stated that she's nervous, [13] so be it.

MS. LEVINE: Your Honor, the standard is not just a hunch or a suspicion or even a reasonable suspicion for a strip search. It's a high standard of clear indication.

As the court, the Ninth Circuit, in Ek stated it, there must be a clear indication of body smuggling. Not some suspicion that she is engaged in something, but a clear indication that there is something in her body.

THE COURT: So your contention is that, under all the circumstances, they were obliged to let her go.

MS. LEVINE: Yes, exactly.

THE COURT: Even though she refused to have an X-ray.

MS. LEVINE: Exactly, your Honor. My contention is that you can't make someone give up their right to enter this country when their passport is in order, on giving up some other right they are entitled to, a Fourth Amendment right. She is legally admitted, and there is no clear indication to hold her.

Just based on some suspicion, the Ninth Circuit has held that that is not sufficient to hold her.

THE COURT: Well, the Ninth Circuit may have to hold it again in this case, because the Ninth Circuit didn't have this case before them.

[14] But it seems to me that they had a right to, particularly in view of the fact that during the next several hours she would not eat anything or drink anything or go to the bathroom; plus the fact that, when another officer came, he concluded that they should seek a warrant. They had a right to wait for a while until they could get a search warrant.

Apart from that, I will hold that, as far as this Court is concerned, that under the facts that were before them, they had the right to—since she would not accept an X-ray, they had a right to send her back to Colombia.

MS. LEVINE: Your Honor, I will argue the motion later. There are some facts that I am going to need to get out for the record, and there are some things that I'd like to address that the Court just mentioned.

THE COURT: All right.

MS. LEVINE: First, that she did not eat or drink or use the restroom for several hours is material that was gathered by Customs after what I believe was an illegal detention.

THE COURT: Yes. If I conclude that they had no right to detain her, to send her home, the latter would be out of bounds.

MS. LEVINE: Second, there is no right for [15] Customs, and the government has cited no grounds, to deport people. People have to be deported through the Immigration process. A Customs officer has no right to say, when someone has been lawfully admitted, "I've just decided to deport you."

THE COURT: I don't think it's a matter of deportation. I don't think she was in yet.

MS. LEVINE: Your Honor, I would cite the Court—and I would look it up later—to a regulation from a CFR

which states that an individual is admitted at the time the Immigration officer stamps them as admitted, and at that point they are admitted into the United States for all purposes.

Customs can only deal with them carrying in materials that they shouldn't be carrying in.

THE COURT: Which, of course, was this case.

MS. LEVINE: Well, your Honor, that doesn't mean that they can deport somebody. That just means that they are a separate law-enforcement agency that has an ability to enforce laws.

The Drug Enforcement Administration is a law agency, but they can't deport people.

THE COURT: Does the government agree that, in view of where this lady was, the officer had no right to say, "If you won't have an X-ray, we will put you [16] back on the plane to Colombia"?

MR. NIESEN: No, your Honor. I think what's critical here—and there is no doubt, and I don't want to mislead the Court at all—there is no doubt that this person cleared through Immigration.

However, the process of coming into the United States involves clearing both Immigration as well as Customs.

In this particular case, this lady never cleared Customs. She was given an alternative, or actually told what the alternative would be, which is that they would return her on the next available flight. That is exactly what they proceeded to attempt to do.

THE COURT: There is also some indication of their right to detain her until the natural processes of elimination have had a chance to function.

MS. LEVINE: Your Honor, that would be footnote 5 of Couch, and Couch is clearly a probable cause case. In Couch, there was not only a—and the court said that in dictum—there was not only a reliable informant's tip that Ronald Couch was coming through with drugs in him, there were a lot of self-authenticating facts, including where the ticket was purchased; and it's totally inapplicable to the facts of this case.

THE COURT: All right, Ms. Levine. You make [17] your record.

But I go back to the proposition: The Constitution prohibits unreasonable searches and seizures. I'm clearly of the view, and I know a record is being made of this, that under all the circumstances the officers had a right, A, to be very suspicious, to the point of proposing an X-ray; and if this lady refused the X-ray, that would tend to confirm the suspicion, and I believe they had a right not to allow her to remain in the country, or not to allow her in, whatever the case may be, and they had a right to send her back to Colombia.

In the meantime, I also believe that they had a right—once they concluded that they would seek a warrant to justify the X-ray, they had a right to detain her while seeking to obtain that warrant.

Then, of course—I forget whether they found the first balloon before or after the warrant was obtained.

MS. LEVINE: After the warrant, your Honor.

If I may, I want to address those issues now, but I will save it later for argument, because I think they are—

THE COURT: Now you make your record.

MS. LEVINE: Thank you, your Honor.

Q. You asked Ms. de Hernandez some questions when she passed through your secondary Customs station, [18] didn't you?

A. I asked her some questions, yes.

Q. You asked her why she was here; right?

A. The nature of her trip, yes.

Q. She said that it was a business trip; right?

A. Yes.

Q. She said she was here to buy items for her husband's store in Colombia; right?

A. Yes.

Q. She said those items were clothing; right?

A. Yes.

Q. And some appliances; right?

A. Small appliances.

Q. Ms. de Hernandez had a book of invoices with her, didn't she?

A. Yes.

Q. She showed that book to you, and you looked at it; right?

A. Yes.

MS. LEVINE: May I approach the clerk, your Honor?

THE COURT: Yes.

MS. LEVINE: May I have that marked Defense Exhibit 102 for identification.

THE CLERK: Did you assign the passport a [19] number?

MS. LEVINE: 101.

THE CLERK: Okay. I didn't hear that.

102 is marked for identification and is before the witness.

(Defendant's Exhibit 102 marked for identification.)

BY MS. LEVINE:

Q. That is the book of invoices she showed you, is it not?

A. Yes.

Q. That's the book she brought into the United States; right?

A. Yes.

MS. LEVINE: I would move that into evidence, your Honor.

MR. NIESEN: No objection.

THE COURT: It may be received.

(Defendant's Exhibit 102 received in evidence.)

MS. LEVINE: Your Honor, I ask the Court to examine those invoices, too.

THE COURT: I don't need to.

BY MS. LEVINE:

Q. Ms. de Hernandez showed you a business card, [20] didn't she?

A. Yes.

Q. She said that was from her husband's business in Colombia; right?

A. Yes.

MS. LEVINE: May I approach the clerk, your Honor?

THE COURT: Yes.

All of that is in one of the declarations, is it not, the business card? I remember that.

MS. LEVINE: Your Honor, it is in the declaration. However, I would like this witness to identify this business card.

THE CLERK: Exhibit number, please, Counsel.

MS. LEVINE: 103.

THE CLERK: Exhibit 103 is marked for identification and is before the witness.

(Defendant's Exhibit 103 marked for identification.)

BY MS. LEVINE:

Q. That's the business card, isn't it?

A. Yes.

MS. LEVINE: I move that into evidence, your Honor.

MR. NIESEN: No objection, your Honor.

[21] THE COURT: It may be received.

(Defendant's Exhibit 103 received in evidence.)

BY MS. LEVINE:

Q. After you examined Ms. de Hernandez' luggage, you called a female Customs inspector over; correct?

A. No.

Q. You spoke to a female Customs inspector about having a personal search done on Ms. de Hernandez, didn't you?

A. Not immediately afterward.

Q. You did speak to a female Customs inspector about having her searched then, did you not?

A. Yes, I did.

Q. A search was done, to your knowledge; right?

A. Yes.

Q. Nothing was discovered in the search, to your knowledge; correct?

A. Correct.

Q. Then you asked Ms. de Hernandez to consent to an X-ray; right?

A. Yes.

Q. She didn't consent.

A. She consented initially.

Q. She did not consent eventually; correct?

[22] A. Towards the end, no.

Q. So she did not allow you to take an X-ray of her; right?

A. No.

Q. Now, to get a court order for an X-ray, you have to go through your supervisor; right?

A. We pass the information to him, yes.

Q. So you spoke to the supervisor about getting a court order; right?

A. Yes.

Q. Now, Inspector Serrato, you're not trained in the law, are you?

A. I don't understand the question.

Q. You are not trained in what degree of suspicion is necessary to get a court order, are you?

A. No.

Q. At some point, you heard that no court order would be issued in this case; right?

A. Yes.

Q. You were told that by your supervisor; right?

A. Yes.

Q. While you were waiting to hear if you would get a court order, you held Ms. de Hernandez in custody, didn't you?

A. I don't understand your question.

[23] Q. You held Ms. de Hernandez while you were waiting to get that court order; right?

A. I still don't understand your question.

Q. While you were waiting to hear from your supervisor about the court order, Ms. de Hernandez was in your presence; right?

A. Yes.

Q. She wasn't free to leave, was she?

A. No.

Q. During that time, she asked you if she could call her husband, didn't she?

A. Yes.

Q. She told you that you should call her husband, didn't she?

A. Yes.

Q. To verify the information she gave you; right?

A. Yes.

Q. She offered to give you the phone number; right?

A. Yes.

Q. You didn't call her husband, did you?

A. No.

Q. Now, when the Customs inspector came back and told you there would be no court order, he gave you some instructions; right?

A. Yes.

[24] Q. He instructed you to hold Ms. de Hernandez in your custody for deportation; right?

A. Not in my custody.

Q. To have her held for deportation; right?

A. No. She was going to be detained.

Q. He instructed you to detain her.

A. Yes.

Q. The purpose of the detention was a deportation; right?

A. To have her leave the country, yes.

Q. This was about 1:00 A.M.; right?

A. Yes.

Q. You told Ms. de Hernandez that you were holding her for a deportation, didn't you?

A. Yes.

Q. You told her she was to remain in your custody during that period; right?

A. Yes.

Q. She was not allowed to leave your custody or the custody of Customs during that period, was she?

A. No.

Q. At this point, you told her that you thought the next plane would not be until Monday; right?

A. Yes.

Q. That's two days later; right?

[25] A. Yes.

Q. You thought you could hold her for two days; right?

A. I don't understand your question.

Q. You thought you could hold her in your custody for two days; right?

A. I don't understand your question.

Q. That the next plane wasn't until Monday. Did you think you could hold her until that Monday?

A. I was instructed to.

Q. If the next plane hadn't been for seven days, did you think you could hold her for seven days?

MR. NIESEN: Objection, your Honor. Calls for speculation.

THE COURT: Sustained.

BY MS. LEVINE:

Q. After you found out you were to detain Ms. de Hernandez, you took her to the manifest room; right?

A. Yes.

Q. You sat with her in that room; right?

A. Yes.

Q. She was in your custody at that time; right?

A. Yes.

Q. She was there with another Customs inspector; [26] right?

A. Yes.

Q. She was not free to leave; right?

A. No.

Q. Now, this was about 1:30 A.M. you went to the manifest room; right?

A. Yes.

Q. You left work that day at 8:30 A.M.; right?

A. Yes.

Q. That was seven hours later; right?

A. Yes.

Q. She was kept in that room the entire seven hours.

A. Yes.

Q. During that seven hours, she was not searched, was she?

A. No.

Q. She wasn't there for any search, was she?

A. No.

Q. In the manifest room, there were chairs; right?

A. Yes.

Q. There wasn't a bed, was there?

A. No.

Q. There wasn't a couch?

A. No.

[27] Q. They are typical office chairs; right?

A. Yes.

Q. Straight back?

A. No, they're curved.

Q. Slightly curved.

A. Yes.

Q. She sat in that chair for seven hours; right?

A. Yes.

Q. Then you left work.

A. Yes.

MS. LEVINE: Nothing further of this witness.

THE COURT: Do you wish to examine the witness?

MR. NIESEN: I have nothing further of this witness.

THE COURT: Sir, you may be excused. Thank you for your testimony.

(Witness excused.)

THE COURT: What further witnesses do you desire?

MS. LEVINE: Your Honor, Kyle Windes, please.

THE COURT: Is anyone getting him.

MR. NIESEN: Just a moment, your Honor. We will get him.

(Witness sworn.)

THE COURT: We'll recess for 10 minutes, until [28] 25 minutes of 4:00.

(Recess.)

KYLE EUGENE WINDES,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Sir, would you please state your name and spell your last name for the record.

THE WITNESS: My name is Kyle Eugene Windes, last name is W-i-n-d-e-s.

MS. LEVINE: Attached to Mr. Windes' declaration is the affidavit in support of the court order, and I have no objection to that being admitted as being the affidavit in support of the court order. However, much of the information came from, if not all of it, Inspector Talamantes, who is not here and will not be here.

I would move to have that limited to only being used as the affidavit for the court order and not being used as Mr. Windes' testimony in court today.

THE COURT: All right.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Agent Windes, you were the Customs duty agent [29] on March 5th, 1983; right?

A. Yes.

Q. As the Customs duty agent, if a court order is to be sought, it's your duty to contact the U.S. Attorney; right?

A. In such an instance as this, yes.

Q. The Customs inspectors go through you in getting the court order; right?

A. Yes.

Q. Now, on March 5th, you received a call from Customs Inspector Olinde at about 1:30 A.M.; right?

A. Yes.

Q. You were sleeping at the time you received the call, weren't you.

A. Yes.

Q. Olinde asked you to obtain a court order for an X-ray search of Ms. de Hernandez; right?

A. I don't know that he specified what the search—what the affidavit would be, or the court order would be for; but they wanted a court order, I think in terms just generally of a court order was used.

Q. You told Inspector Olinde that the current policy was not to obtain court orders; right?

A. That's right.

Q. The current policy, you told him, was at that [30] point to deport somebody; right?

A. No. I told him that the policy at that time, as I understood it, was that people in these situations would voluntarily submit to medical examination, remain in custody until such time as the Customs personnel were satisfied that they were not carrying contraband, or leave the country; the choice being theirs.

Q. But at 1:30 A.M., you took no steps to obtain a court order; right?

A. No, I did not.

Q. You were called again at about 3:30 A.M. by Olinde; right?

A. Yes.

Q. He again asked you about a court order; right?

A. Yes.

Q. You were asleep at that time; right?

A. Yes.

Q. You again reiterated the policy was not to obtain court orders; right?

A. Yes.

Q. It wasn't until about 4:00 P.M. on the 5th of March that you began to prepare an affidavit for getting a court order; right?

A. That's correct.

Q. Between 1:30 A.M., when you were first called, [31] and 4:00 P.M. you took no positive steps in obtaining a court order, did you?

A. That is correct.

Q. So when the defendant was in custody from 1:30 A.M. to 4:00 P.M., it was not for the purpose of obtaining a court order; right?

A. That is correct.

MS. LEVINE: Nothing further of this witness.

THE COURT: Do you wish to examine the witness?

MR. NIESEN: I have nothing, your Honor.

THE COURT: All right, Mr. Windes, you may be excused. Thank you for your testimony.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: What's next, please?

MS. LEVINE: Marilee Morgan, your Honor.

Your Honor, while we are waiting for the witness, if I may bring out the parts of this that I would object to.

THE COURT: All right.

MS. LEVINE: Paragraph 4 of the last sentence, starting at line 26:

"She seemed to make a point of letting us know she had pictures of her children."

Your Honor, I believe that's speculative, and I [32] move to strike that statement.

THE COURT: All right, that may be disregarded.

MS. LEVINE: Paragraph 12, starting on line 23:

"While driving next door to the county ward, Talamantes made a comment that Hernandez had just offered him a bribe."

I believe that's all hearsay, and I move to strike it.

MR. NIESEN: Your Honor, I would join with that.

THE COURT: Yes, that will be disregarded.

MS. LEVIN: That would be all, your Honor.

THE COURT: All right.

MARILEE SUE MORGAN,

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Ma'am, would you please state your full name and spell your last name for the record.

THE WITNESS: Marilee Sue Morgan, M-o-r-g-a-n.

THE CLERK: Thank you.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Ms. Morgan, do you speak Spanish?

A. Very little.

[33] Q. In your declaration, Ms. Morgan, you state that Talamantes explained the situation to her, and at that point you are talking about the court order situation.

Now, tell me—

MR. NIESEN: Excuse me, Counsel. Can you tell me where you are referring?

MS. LEVINE: That would be paragraph 9 of the declaration, lines 26 to 27. I'm sorry.

THE COURT: All right.

BY MS. LEVINE:

Q. Talamantes, when he spoke to Ms. de Hernandez, he spoke in Spanish; right?

A. Yes.

Q. So you don't really know what he was saying to her, do you.

A. Not really.

Q. Now, on page 3 of your declaration, paragraph 12, you state on line 21 that Ms. de Hernandez was read the Miranda warnings in Spanish; and you don't really know if she was read the Miranda warnings, do you?

A. He had the warning in his hand, and he read them to her.

Q. Something was said in Spanish; right?

A. Yes.

[34] Q. You don't know what the content was.

Now, it was about 9:15 A.M. that you began sitting with Ms. de Hernandez on March 5th; right?

A. Yes.

Q. At that time, she was in a search room; right?

A. Yes.

Q. The search room is not a large room, is it?

A. No, it's not.

Q. There were chairs in the room; right?

A. Yes.

Q. Ms. de Hernandez had a chair to sit in.

A. Yes, she did.

Q. That was an office-type chair; right?

A. Yes.

Q. There was no place for her to lie down in that room, was there.

A. Just on the floor.

Q. It's a hard floor; right?

A. Yes.

Q. Uncarpeted.

A. Uncarpeted.

Q. You sat with Ms. de Hernandez in that room from about 9:15 A.M. until about 12:00 A.M., with the exception of one hour; right?

A. Correct.

[35] Q. That's about 14¼ hours; right?

THE COURT: Well, whatever the arithmetic is.

MS. LEVINE: Very well.

Q. She was in your custody that entire time; right?

A. Yes.

Q. At about 3:00 P.M., you participated in a strip search of Ms. de Hernandez; right?

A. Correct—excuse me. It was more a partial strip search.

Q. You had her take down her pants.

A. Yes.

Q. And her panties; right?

A. Yes.

Q. Nothing illegal was found in that search; right?

A. No.

Q. In your declaration, it states that Ms. de Hernandez had no toilet articles in her suitcase; right?

A. Right.

Q. Did you examine her purse?

A. I didn't.

Q. So you don't know if she had toilet articles in there; right?

A. Correct.

MS. LEVINE: Nothing further of this witness.

[36] THE COURT: Do you wish to examine the witness?

MR. NIESEN: I have nothing further.

THE COURT: All right, Ms. Morgan. You may be excused. Thank you for your testimony.

(Witness excused.)

THE COURT: What's next?

MS. LEVINE: Your Honor, it would be Inspector Mendoza, and there will be one final inspector, Gonzalez, and they will both be short cross-examinations, your Honor.

Your Honor, in Inspector Mendoza's declaration, paragraph 11, the last sentence of the declaration, that's lines 12 through 13:

"This passenger had also claimed pregnancy as per Inspector Serrato."

I believe that's been established, but in this declaration, it is hearsay.

THE COURT: Whereabouts are we?

MS. LEVINE: The last page of the declaration, lines 12 through 13.

MR. NIESEN: Page 35, your Honor.

I have no objection.

THE COURT: Very well.

* * *

[37] called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

THE CLERK: Ma'am, would you please state your full name and spell your last name for the record.

THE WITNESS: My name is Teodora A. Mendoza, M-e-n-d-o-z-a.

THE CLERK: Thank you.

CROSS EXAMINATION

BY MS. LEVINE:

Q. Inspector Mendoza, do you speak Spanish?

A. Very little.

Q. Now, on March 5th, 1983, at about 12:30 A.M., you were requested by Inspector Serrato and Inspector Ozawa—I believe that's how it's pronounced—to do a pat search of Ms. de Hernandez; right?

A. That is correct.

Q. During that pat search, there was cause for you to have Ms. de Hernandez pull down her pants; right?

A. That is true.

Q. And her panties; right?

A. She voluntarily pulled her panties down. I didn't have to request that.

Q. Nothing illegal was found during that search; [38] right?

A. No.

Q. In your declaration, you state that—this is on paragraph 10, line 26:

"Passenger was informed in Spanish by Inspector Serrato of her impending deportation and was quite agreeable."

Did you speak to Ms. de Hernandez in Spanish?

A. Myself, no.

Q. You didn't understand when Inspector Serrato was speaking to her in Spanish, did you?

A. I can understand some Spanish from what I've had in school and overall dealing in general. My comprehension is somewhat better than my ability to speak it. So I was able to pick out some words and determine that he was giving her this information.

Q. But you couldn't understand everything that was said.

A. Everything, no.

Q. Now, at about 1:00 A.M. you were told that no court order would be issued in this case; right?

A. I was told that they weren't going to go for one.

Q. You were instructed to detain Ms. de Hernandez for deportation; right?

[39] A. That is true.

Q. You remained with her from 1:00 A.M. for several hours; right?

A. Yes.

Q. You took her to a room during that period to watch her; right?

A. That is true.

Q. When she was in that room, she was told that if she had to use the restroom she was to do that in a wastebasket; right.

A. Yes.

Q. The wastebasket was going to be in the bathroom; is that right?

A. Yes.

Q. If she had decided to use the wastebasket, she would have been observed by Customs inspectors doing so; right?

A. Two females.

Q. Two female Customs inspectors would have watched her as she used the restroom; right?

A. That is correct.

MS. LEVINE: Nothing further.

MR. NIESEN: Two quick questions, your Honor.

[40] REDIRECT EXAMINATION

BY MR. NIESEN:

Q. Counsel used the word "deportation." Were you told that she was to be deported, or were you told that she was to get the next flight back to Columbia?

A. The word that was used, and also incorrectly by our own people, was "deported." But it meant the same thing, to be sent out of the country.

Q. My last question is: With respect to this two females watching her go to the bathroom, what's the purpose of that?

A. Well, being that we did have our suspicions of her and we were detaining her, it was to prevent her from flushing a toilet, just in case she had had, you know, foreign objects within her body and they did get expelled.

MR. NIESEN: Nothing further, your Honor.

THE COURT: You may be excused. Thank you for your testimony.

(Witness excused.)

THE COURT: What's next?

MS. LEVINE: Inspector Gonzalez would be the final witness, your Honor.

Looking at my questions, I don't believe there is any necessity for having Inspector Gonzalez testify.

THE COURT: All right. Would you call him off, [41] Mr. Cochran, please.

MR. NIELSEN: May these witnesses be excused? They do have to get to work.

THE COURT: Are your witnesses excused?

MS. LEVINE: Yes, your Honor.

THE COURT: Yes, they may be excused.

MR. NIESEN: Thank you, your Honor.

THE COURT: Anything that you would like to present?

MS. LEVINE: No evidence, your Honor. I would like the chance to argue.

THE COURT: Go right ahead.

MS. LEVINE: Thank you, your Honor.

I do have some feeling that I'm arguing up a sinking ship in this court, but I'll do my best.

THE COURT: I'm not sure about the metaphor, but—

MS. LEVINE: I'm not sure it came out correctly, but I think the Court has some idea of what I'm trying to say.

THE COURT: Yes, I think I do.

MS. LEVINE: Your Honor, in any border search question, the first proposition is that an ordinary border search can be conducted without any cause, and I think that is clear.

[42] To do any further search outside the ordinary, further kinds of cause are needed: To do a strip search, real suspicion is needed; to do a body cavity or an X-ray search, there must be a clear indication that the suspect is involved in body cavity or internal smuggling.

THE COURT: How do you get such an indication?

MS. LEVINE: Well, the cases, your Honor, that have found clear indication have had things other than just suspicions. What they've had, and I have some here: *U.S. v. Aman*, your Honor.

THE COURT: Don't cite the cases. Just tell me what, in your reading, what do you have to have?

MS. LEVINE: In order to have an X-ray, your Honor, they have to have either restricted body movement, computer entries relating to drug use, inconsistent answers to questions, lack of substantiation, disorientation, evidence of recent drug use like needle marks on the arms.

In this case, there is no such thing. In this case—

THE COURT: There are no needle marks on the arms, but the recital that I made earlier was based upon the record, was it not, except with respect to the looking nervous?

MS. LEVINE: Your Honor, what I would say they [43] at the point Ms. de Hernandez crossed Customs, when they first held her, is what's in the declaration of Inspector Serrato, who was the person working secondary who detained her initially.

If the Court looked at the declaration of Inspector Serrato—it begins on page 19—it doesn't recite any of those things about nervousness. All Inspector Serrato says is she had no shoes, no toiletries, and little clothing, which we know is wrong from the stipulation. From the stipulation, the woman had four pairs of pants, two skirts, plus the clothing she had on, her jacket, three blouses, two sweaters, plus substantial toiletries. And she fit the profile, according to him.

That is all the information that is in Inspector Serrato's declaration, and all the information that was before him at the time that he decided to detain her; and then she is detained.

Your Honor, the Ninth Circuit has said that when somebody is detained for a search—and this is in a footnote in *Ek*—the standard that applies is the Dunaway standard. You must have probable cause at that time for the detention.

She is detained on Inspector Serrato's guess that she fits the narcotics profile. Inspector Serrato, who is not trained in the law, doesn't know what the standard [44] is, and she is detained for 16 hours until a court order is sought, 24 hours until it's obtained.

What the government is doing in this case is saying that somebody can be detained on a suspicion for that period of time, and the Ninth Circuit has said that's not true.

You can detain someone for a search, if you have the type of suspicion necessary for the search, only as long as

it takes to conduct that search. Here no search was being conducted, so Dunaway applies, and there must be probable cause or everything goes out.

THE COURT: Let me ask the government:

Is it the government's position that a Customs inspector can make the election, "Either you submit to an X-ray search or you're going home to Colombia"?

MR. NIESEN: I believe the answer—

THE COURT: "And we'll keep you for 30 hours until there's a plane going home to Colombia"?

MR. NIESEN: I believe the answer is that a person entering the United States has an obligation to pass through Customs, to go through a Customs search.

THE COURT: Yes.

MR. NIESEN In this particular case, the Customs inspectors were not satisfied with that search. As a consequence of that, various alternatives were [45] proposed. One of those alternatives was: You can volunteer for your X-ray, and we'll call it quits right there if nothing comes up. The other proposal was: Or go back where you came from, therefore you avoid the problem entirely.

THE COURT. Yes, I understand that's what happened, and I understand that there was not going to be a plane that she could get on for, what?—another 30 hours or something like that?

MR. NIESEN: Well, what occurred was—

THE COURT: I know what occurred: She couldn't stay in Mexico long enough to make the transfer.

But your position is that the discretion is within the expertise and expert discretion of the Customs officers to make that determination, either X-ray or out you go.

MR. NIESEN: I believe that is correct, your Honor. However, at the same time, I would not argue in court that there are not reasonable grounds for that. I would be very uncomfortable arguing in court that we can keep somebody a week while they make this decision or whatever, because they don't want to admit them.

But in this particular case, I think that they acted reasonably. The only reason that she was continued to be detained at that point was to effectuate this [46] decision to send her back to Colombia.

THE COURT: All right, I understand that.

Now, suppose, hypothetically, suppose I'm a Customs inspector, and I see a person coming across; there are no objective symptoms that I could lay a finger on, but I just have a waving of my antennae in such manner that this person looks suspicious, and I think she may be carrying something in her body.

Therefore, I may say, "X-ray, or out you go"?

MR. NIESEN: Your honor, I'm not sure that would be so. I think that your decision-making would have to stand some objective tests; and before you get an X-ray, you're going to have to make a showing, as the law currently is in this circuit, a clear indication to justify that X-ray search, if you're going to do it involuntarily.

THE COURT: Based upon the initial examination and up to her declination to have an X-ray search, did they make a mistake in saying that would not apply for a warrant?

MR. NIESEN: In my opinion, your Honor, a warrant would have been justified at that point in time. They could have gone for a warrant, had they known that to be an alternative.

THE COURT: If they had so applied under Ek they would be justified in detaining her until the [47] magistrate could act on the warrant.

MR. NIESEN: Certainly.

THE COURT: Now, here, the reason why they would detain her was in awaiting a plane back to Colombia—

MR. NIESEN: That's correct, your Honor.

THE COURT: —until somebody second-guessed the first decision and decided to go for a warrant.

MR. NIESEN: That is what happened, your Honor.

THE COURT: But, of course, in the meantime, a few more things happened: She refused food and water, and

she insisted upon lying down, that sort of thing. But you can't take that into consideration if the initial detention was unjustified.

MR. NIESEN: I would agree, your Honor. There is no doubt that the initial detention would have been legal, because the standard for that is—the threshold is extremely low. It's just basically a suspicion.

THE COURT: So you have to justify the initial detention to send her home before you had all the evidence that was ultimately presented—in order to get all the evidence that was ultimately presented to the magistrate, because some of the things that were a make-wait did not occur until after she had been detained several hours.

NIESEN: All right, let me take it piece by piece. I believe that the initial detention, had it been [48] illegal, would have been fatal.

THE COURT: Okay.

MR. NIESEN: In this particular case, there is no problem.

I believe, then, the decision to detain her, literally—the option would be to let her go, and she just is not clearing Customs. You would have to say that Customs officers, in the discharge of their duties, were not acting reasonably in detaining her until they could get her on the first available flight.

They made those efforts, and during that period of time they observed other things which, again, whetted their belief.

THE COURT: All right. Thank you.

How much longer will you be?

MS. LEVINE: Probably five minutes.

THE COURT: Okay, go ahead.

MS. LEVINE: Your Honor, it's my position that there was no clear indication or probable cause or any grounds to hold Ms. de Hernandez when the strip search was negative. I am not conceding there was cause for a strip search, but, since nothing was found, it's not at issue.

But the facts in this case do not justify a finding of probable cause for the detention, or even clear [49] indication for the X-ray search or the body cavity search that was ultimately performed.

Perhaps—and I'm not going to argue at this point what happened 16 hours later after not eating or drinking.

THE COURT: They had to let her go.

MS. LEVINE: At the first point, they had to let her go.

The the government is arguing, your Honor, is that anybody who comes through that doesn't sit right with them—and that's all they had here, are facts that don't sit right.

THE COURT: So all the cocaine smugglers have to do is get some people that can contain that stuff in their alimentary canals long enough, and send them through, and the Customs have to let them go. They can't detain them.

MS. LEVINE: What I am saying is that the Fourth Amendment applies in a border search situation when it's unreasonable—

THE COURT: In determining reasonableness, can they take into account their knowledge that many people bring those things in in their intestinal canals?

MS. LEVINE: Your Honor, the only knowledge that is before us in any declarations in this case is that [50] the same day another woman came through and was offered the same choice, and went through an X-ray and had nothing in her.

So what they are doing is they are saying, "We have a suspicion. To come in this country, although you have cleared Immigration and gotten your documents, you must give up your Fourth Amendment rights or go home"; and that's not what this—

THE COURT: You're begging the question. I'm concerned about the Fourth Amendment. I'm concerned as to whether or not the detention was unreasonable. We now know that it would have been a travesty to let her go. I know that's ex post facto; we can't consider that.

But the fact of it is, under all the circumstances—and I'm not going to go through them again—it seems to me that, in view of the fact that she refused the X-ray, the government officials could have a substantially grounded suspicion that she may very well have been carrying those balloons.

MS. LEVINE: Your Honor, the question, though, is not founded suspicion; and, at the point she went through, what's clear is only what Inspector Serrato says, and these are the only facts before the Court: that she had the clothing as stipulated to—

THE COURT: I know it. I've read the record.

[51] MS. LEVINE: Your Honor, there's nothing in the facts that says she's nervous, that indicates her answers were inconsistent. All it says is that she's coming from Colombia and she speaks Spanish, so we can hold her until we decide to deport her; and I don't think the law grants that.

The law says if you detain somebody, you must have probable cause to do so or be seeking a court order, and then you must have clear indication to get that court order.

She was not being held to get a court order, and there was no probable cause to hold her.

THE COURT: All right.

MS. LEVINE: Finally, there is one argument I would like to address, and it will probably be a minute and a half.

The government argues in its brief that the detention was justified based on footnote 5 of Couch. As I said before to the Court, Couch is a probable cause or a clear indication case.

But what the government argues is that, in a case where there is no clear indication, in essence, you can hold anyone—or no probable cause, until they have a clear bowel movement.

I would submit to the Court that that is [52] patently absurd.

THE COURT: You'd certainly have to have a lot more restrooms down there, wouldn't you—

MS. LEVINE: And a lot more Customs inspectors.

THE COURT: —and places for detention, and a lot more Customs inspectors.

No, you have to have more than that.

MS. LEVINE: Your Honor, finally, I'd like to address the issue that, in the government's paper it says that Ms. de Hernandez voluntarily consented to deportation. I believe what's been shown to the Court in this hearing is that she was told that she would be deported, and there was no question that she didn't consent or have any choice.

THE COURT: I'm not going to make any ruling on the supposition that she did consent.

MS. LEVINE: I submit it at this time, your Honor.

THE COURT: I'm going to deny the motion to suppress the cocaine that she excreted. It seems to me that, under all the circumstances, the officers were justified in having a very substantial suspicion that this lady may very well be bringing in cocaine, to the point where they were justified in seeking and proposing an X-ray.

Having refused the X-ray, I am of the view—[53] it is my understanding that, under all those circumstances, they were justified in saying, "If you do not agree to an X-ray, we are not obliged to let you go. We will just keep you for a while until, A, we can send you back home; or, B, you have a regular bodily function that might indicate that you are carrying something."

I am putting aside the fact that they did ultimately get a warrant, because several things happened before they even applied for it. If they had no right to detain her as long as they did before that occurred, then they had no right to use the evidence that occurred while they were detaining her.

Under those circumstances, the motion to suppress will be denied.

— This is on for tomorrow, isn't it?

MS. LEVINE: Yes, your Honor. It will be a stipulated facts trial.

* * * *

DECLARATION OF KYLE E. WINDES

I, Kyle E. Windes, am a Special Agent of the United States Custom [sic] Service and have been for eleven years, declare as follows:

1. On Saturday, March 5, 1983, I was acting as duty agent. At approximately 1:30 a.m. I receive [sic] a telephone call from Customs Inspector Olinde. Customs Inspector Olinde told me that a female passenger, recently arrived from Colombia, was believed to be a narcotics courier in that she met the profile developed for "balloon swallowers." Customs Inspector Olinde wanted me to prepare to obtain a court order for medical examination of the passenger.

2. I informed Customs Inspector Olinde that the current policy was to not obtain court orders in such cases and that the passenger must submit voluntarily to examinations by medical personnel, remain in custody until her bowels move and the product of the movement can be examined or depart the United States.

3. At approximately 3:30 a.m. the same date, I was again called by Customs Inspector Olinde and spoke with him and Customs Inspector Tallamantes [sic]. They reiterated their prior request and I reiterated my prior answer.

4. On neither of these two occasions did I discuss in any detail the reasons the Customs Inspector had for believing the passenger was a drug courier. My refusal to initiate the process of applying for a court order was based on my understanding of an office policy which applied to these matters.

5. At approximately 12:30 p.m. on Saturday, March 5, 1983, I was called at the office by Allen Walls, the Special Agent in charge. Special Agent Walls told me he had been contacted in the matter of the suspected "balloon swallower" of the night before and suggested that I explore the possibility of obtaining a court order as originally requested.

6. At approximately 1:00 p.m. I phoned Satellite 2 at Los Angeles Airport and spoke with a supervisory inspector. I was told that Customs Inspector Helen Bissen was talking with the passenger and would call me back.

7. I subsequently spoke with Customs Inspector Bissen but was unable to get a clear picture of the circumstances surrounding the matter.

8. At approximately 4:00 p.m. I arrived at Sattellite [sic] 2, Los Angeles Airport, spoke with Customs Inspector Bissen and Customs Inspector Talamantes, and examined the effects of the passenger.

9. I then began to prepare an affidavit in support of an application for a court order for medical examination and called for the Duty Assistant United States Attorney. I was subsequently called by Assistant United States Attorney, Brian Sun. I explained the situation to Mr. Sun and discussed the affidavit with him.

10. Assistant United States Attorney Sun believed there were sufficient grounds to request the court order. Assistant United States Attorney Sun began to locate the Duty Magistrate.

11. At approximately midnight on March 5, 1983, I spoke by telephone with Magistrate Giffen. I read to him the affidavit and the draft court order. Magistrate Giffen approved the court order (copies of the affidavit and draft court order are attached as copies to this document).

12. I then called Customs Inspector Talamantes at Los Angeles Airport and told him a court order had been granted. I drove then to County USC Hospital where I met Customs Inspector Talamantes and the passenger, Rosa Hernandez, in the jail ward.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Kyle E. Windes
KYLE E. WINDES
Special Agent
United States Custom Service

I, KYLE E. WINDES, AM A SPECIAL AGENT WITH THE U.S. CUSTOMS SERVICE, U.S. TREASURY DEPARTMENT. I HAVE BEEN A SPECIAL AGENT OF THE CUSTOMS SERVICE FOR ELEVEN YEARS.

THIS AFFIDAVIT IS MADE IN SUPPORT OF AN APPLICATION FOR THE FOLLOWING COURT ORDERS:

1. PREGNANCY TEST
2. IF NOT PREGNANT, A COURT ORDER FOR AN X-RAY EXAMINATION.
3. IF PREGNANT, A COURT ORDER FOR A BODY SEARCH.

I HAVE BEEN ADVISED BY CUSTOMS INSPECTOR EDWARD TALAMANTES OF THE FOLLOWING:

1. HE HAS BEEN A CUSTOMS INSPECTOR FOR THREE YEARS AND WAS ON DUTY AT SATELLITE 2, LOS ANGELES INTERNATIONAL AIRPORT (LAX) ON MARCH 5, 1983, at 0040 hours.

2. AT THAT TIME, HE ADVISED ME, ROSA HERNANDEZ, A PASSENGER ARRIVING ON AVIANCA FLIGHT 080 FROM BOGOTA, COLUMBIA, WAS DETAINED FOR FURTHER CUSTOMS EXAMINATION. PASSENGER WAS REFERRED TO SECONDARY FOR FURTHER EXAMINATION BECAUSE DURING THE INITIAL CUSTOMS EXAMINATION PASSENGER FIT THE SUSPECTED DRUG COURIER PROFILE, EXHIBITED NERVOUS BEHAVIOR.

3. PASSENGER STATED SHE WAS GOING TO STAY AT THE HOLIDAY INN IN LOS ANGELES BUT STATED SHE HAD NO RESENVATIONS [sic].

4. PASSENGER PAID APPROXIMATELY \$882 CASH FOR HER TICKET, WHICH HAS NO RETURN DATE. SHE IS IN POSSESSION OF approximately [sic] \$5,000 U.S. CURRENCY WHICH SHE CLAIMED WOULD BE USED TO STAY IN THE U.S. FOR APPROXIMATELY 10 DAYS AND TO PURCHASE

CLOTHES FOR A BUSINESS IN BOGOTA IN WHICH HER HUSBAND IS A PARTNER. WHEN ASKED, SHE COULD NOT REMEMBER WHERE SHE PURCHASED THE AIRLINE TICKET.

5. PASSENGER HAD NO TOILETRY ARTICLES APART FROM A TOOTHBRUSH, TOOTHPASTE, COMB, BRUSH, ROUGE, AND PERFUME. MOST OF HER \$5,000 IS IN \$50 BILLS. PASSENGER HAS VERY LIGHT LUGGAGE CONTAINING ONLY APPROXIMATELY 4 CHANGES OF CLOTHING. HER ONLY SHOES ARE HIGH HEELS WHICH SHE WAS WEARING. HER RELATIVE LACK OF TOILET ARTICLES, HER LIGHT LUGGAGE, AND HER MONEY BEING IN \$50 BILLS INDICATE A "STRIPPED DOWN" OR "CLEAN" APPROACH TYPICAL OF PROFESSIONAL COURIERS.

6. SINCE APPROXIMATELY 1 AM, MARCH 5, 1983, UNTIL 1900 HOURS THE SAME DATE, AFTER A 10 HOUR FLIGHT FROM BOGOTA, PASSENGER HAS REFUSED FOOD AND DRINK AND HAS REFUSED TO VISIT THE TOILET. PASSENGER SITS CURLED UP IN A CHAIR, LEANING TO ONE SIDE.

7. PASSENGER INITIALLY AGREED TO CONSENT TO AN X-RAY BUT THEN STATED SHE WAS 2 MONTHS PREGNANT. PASSENGER THEN AGREED TO CONSENT TO A PREGNANCY TEST BUT WHEN TIME CAME FOR DEPARTURE TO BE TESTED, PASSENGER REFUSED THE TEST. A STRIP SEARCH WAS PERFORMED WITH NEGATIVE RESULTS. INSPECTOR TALAMANTES HAS HAD EXPERIENCE WITH NARCOTICS COURIERS CARRYING DRUGS INTERNALLY, INCLUDING THIRTY PRIOR SEIZURES OF COCAINE FROM BALLOON SWALLOWERS, AND HE BELIEVES THAT PASSENGER ROSA ELVIRA MONTOYA DE HERNANDEZ IS POSSIBLY CARRYING NARCOTICS INTERNALLY. ALL CONVERSATIONS HAVE BEEN

CONDUCTED IN THE SPANISH LANGUAGE IN WHICH TALAMANTES IS FLUENT.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND RECOLLECTION. EXECUTED THIS 6th DAY OF MARCH, 1983, AT LOS ANGELES, CALIFORNIA.

/s/ Kyle E. Windes
KYLE E. WINDES
Special Agent
U.S. Customs Service

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Mag. No. _____

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA ELVIRA MONTTOYA DE HERNANDEZ, DEFENDANT

ORDER

Upon request of the United States of America and the affidavit of KYLE WINDES, United States Customs Service, and full consideration having been given to the matter, the Court finds that there is a clear indication or plain suggestion that contraband may be located in the body cavities of DEFENDANT (*United States v. Cameron*, 538 F.2d 254 (9th Cir. 1976) and *United States v. Aman*, 624 F.2d 911 (9th Cir. 1980)). IT IS THEREFORE ORDERED:

- (1) That DEFENDANT submit to an X-ray examination of the abdominal area. (See Below)
- (2) That if such X-ray is positive for a foreign matter in the body cavity that DEFENDANT submit to a body cavity search.
- (3) That any medical doctor take whatever means medically safe and appropriate to remove the foreign substance as expeditiously as medically feasible.
- (4) That DEFENDANT shall remain in federal custody until the foreign objects are removed from the body.

IT IS FURTHER ORDERED that DEFENDANT is to submit to these medical procedures without resistance. Medical personnel are authorized to use restraint or force

to implement the order as they deem appropriate and reasonable under the circumstances.

United States Magistrate

Dated:

The X-ray and body cavity search is to be conducted only after a medical doctor has approved the use of the X-ray and body cavity search as appropriate for the Defendant and only after the doctor has considered the Defendant's claim that she is pregnant

DECLARATION OF JOSE ANGEL SERRATO

I, Jose Angel Serrato, declares as follows:

1. I am a United States Customs Inspector assigned to the Los Angeles, California, airport. I have been an inspector since June, 1978.
2. On March 5, 1983, I was working secondary, awaiting for the arrival of Avianca Flight 080 from Bogota, Colombia.
3. Passenger Rosa Montoya de Hernandez was referred to secondary for inspection. A routine review of her passport and airline tickets was conducted by myself. I noticed her passport reflected at least eight previous trips to the United States.
4. I asked passenger De Hernandez all pertinent questions for Customs:
 - a. The purpose of her trip.
 - b. How long will she stay.
 - c. Did she have any agricultural products.
 - d. Did she have \$5000 in any currency.
5. I examined her luggage (she had one hand carried bag). I noticed she had cold weather clothes, no extra shoes, no toiletries, and little clothing.
6. After examining her luggage, I summoned Inspector Edward Talamantes to review all documents and I asked for his advice prior to my conclusions. We both acknowledged that she fit the profile for internal narcotics smuggling.
7. I requested a secondary patdown by Senior Inspector Sue Ozawa and Inspector Teddy Mendoza. This result was negative.
8. I then brought all the information to Supervisor Lee Hixon and Walt Olinde, and I advised them that I would like to request an X-ray of passenger De Hernandez. Both supervisors agreed and asked me to ask passenger De Hernandez if she would consent.

9. I asked passenger De Hernandez if she would consent to an X-ray of her abdomen area, and she stated "yes." I asked her if she was pregnant; she stated "yes." I asked her how long and if she was sure, and she stated "about one month. I just saw the doctor before my trip here." I asked her if she would consent to a doctor's examination here to verify her pregnancy; she stated "yes."

10. Before we left to the hospital, I informed passenger De Hernandez that I had to handcuff her hands and tape her pant legs closed. She stated, "You are not going to put those on me. That is an insult to my character. I have never been treated like this before and I have been through Customs many times. Nobody has ever checked me or my bags so thoroughly before. Why do you have to do this?"

11. I told her that it was Customs' policy and within guidelines for her safety as well as ours. I told her anytime we transport anyone in a government vehicle, they have to be handcuffed.

12. Again she refused consent and she stated, "I want to call my husband and tell him what you are doing to me. He knows people in high places here and I am going to have your job. You don't trust me or my word and it's an insult to my character."

13. I then informed both Supervisors Hixon and Olinde that she had refused consent because we had to handcuff her. Both supervisors went to call the duty agent to request a court order.

14. While we were waiting, I told passenger De Hernandez that in this country we are concerned with her well being and as courteous as possible, that I am trying to do my job without making it an insult to you (her). She stated, "You just don't believe me. Just because I am Colombian you think all Colombians are dirty and smuggle. Well, I want to call my husband right now, or I give you the number and you can call and tell him to send my attorney."

15. I told her we cannot call and we have to wait until we hear from the duty agent.

16. The duty agent, Windes, called back and stated that we could not get a court order and for us to stay with her and deport her on the next available Avianca flight, which was two days away.

17. I told passenger De Hernandez that we were unable to obtain a court order from the Magistrate and we were instructed by Agent Windes to hold her until Monday and deport her on the next Avianca flight. She stated, "I would rather die here right now rather than go to the hospital for you. I already have it in my mind that I will not submit to your degradation and I'd rather die." (This taken from my original notes to refresh my memory.)

18. I told passenger De Hernandez that we will stay with her until Monday until we deport her. I told her also that if while she is in our custody, if she discharges anything illegal internally, she will be placed under arrest and transported to a jail ward and be unable to leave the United States. She made no comment.

19. At this time, Senior Inspector Sue Ozawa, Inspector Teddy Mendoza and myself sat up with her in the manifest room until the next morning. At no time did we sleep or lose eyesight of passenger De Hernandez. Passenger De Hernandez sat in her chair clutching her purse.

20. Passenger De Hernandez was not talkative; she did not go to the ladies room; she did not eat or drink anything.

21. The next morning at 0830 hours, I was relieved by day shift and went home.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 21, 1983.

/s/ Jose A. Serrato
JOSE ANGEL SERRATO

DECLARATION OF MARILEE S. MORGAN

I, MARILEE S. MORGAN, declare as follows:

1. I am a Customs Inspector for the U.S. Customs Service, stationed at the Los Angeles, California, Airport. I have been a Customs Inspector since April, 1978.

2. At approximately 9:15 a.m., March 5, 1983, I was asked by Supervisory Customs Inspector Bissen to relieve Customs Inspector Teddy Mendoza in the search room. She was observing Rose Elvira Montoya De Hernandez, a passenger off the March 4 Avianca Flight 80. I was briefed by Senior Inspector Sue Ozawa, being told to sit in the search room and observe Hernandez, while an effort was being made to obtain a court order for a hospital x-ray and then joined by Customs Inspector Jerome Gonzales in the search room to observe Hernandez.

3. Throughout the day Hernandez sat in a chair in the search room, occasionally putting her head down on the table to nap. Customs Inspector Gonzales and I would occasionally converse with her, myself, in very limited Spanish, at times offering her food, drink and bathroom. But she always refused to eat. She also refused the toilet. Since she spoke and understood Spanish only, Customs Inspector Gonzales acted as an interpreter throughout.

4. Several things struck me as being unusual with Hernandez. First of all, each time someone entered the search room, she would take out two small pictures of her children and show them to the person. The pictures were loose, in her purse—not in a billfold or anything. She seemed to make a point of letting us know she had pictures of her children.

5. She had just over \$5,000 cash on her. She had one small suitcase with her, filled with her own clothing, and said that she planned to stay at the Holiday Inn near LAX. There were no toilet articles in the suitcase. The only pair of shoes she had were those she was wearing, a pair of spike heels. She gave both Gonzales and myself one of her husband's business cards.

6. Her passport indicated she had made at least half a dozen trips to Los Angeles and Miami.

7. Around 3 o'clock that afternoon Supervisory Customs Inspector Bissen had Customs Inspector Daunis conduct another strip search of Hernandez. After Customs Inspector Daunis completed the strip search, I left the search room for approximately one hour, returning to remain for the duration. I was told by Helen Bisson [sic] to go work the passengers.

8. At 4 o'clock Customs Inspector Talamantes relieved Customs Inspector Gonzales who then went home. A few hours later Customs Inspector Britt joined us in the search room. About this time Hernandez complained that she was cold and put on a pair of socks and a sweater. From then on she remained curled up in her chair. Twice she accepted a cup of cola from us but did not drink it. Likewise with some crackers offered her. She took them, opened the pack, but did not eat them.

9. At just after midnight, Customs Agent Kyle Winds [sic] obtained by phone permission for a court order to take Hernandez to the hospital. Customs Aid Henry Elizondo tried to read the court order to her but she became very agitated and he had to give up. Then Talamantes explained the situation to her. Talamantes then handcuffed her, assisted by Britt and myself. She strongly resisted and it took all three of us to control her. But once the cuffs were on she suddenly became very docile and gave us no further problems.

10. At about 12:30 a.m. Customs Inspectors Talamantes, Britt, and myself transported Hernandez to USC Hospital. After checking in at the county jail ward, we took her to the women's hospital next door where a sonogram was conducted on Hernandez to determine if she was pregnant. The doctor explained to Britt and me that Hernandez either appeared to have a mislocated uterus or else a double one. Then a urinalysis was conducted. The result of it, given about an hour later, said that she was not pregnant.

11. After the urinalysis, but before its results were known, a pelvic and rectal exam was given by the doctor. At 3:00 a.m. as he was doing the rectal, he made a comment that it appeared she hadn't gone to the bathroom for a long time. Then he said "I think I might have a present for you" and with that comment he pulled out an object, pale yellow in color, tube-shaped. This was witnessed by Britt and myself. I looked at the object and had Britt notify Talamantes was standing outside the room.

12. We then had Hernandez dress and took her out to the van. While standing outside at 3:15 a.m. she was read the Miranda warning in Spanish by Talamantes and then given the rights to read herself. While driving next door to the county jail ward, Talamantes made a comment that Hernandez had just offered him a bribe. He refused it immediately and said that he was performing his job. Talamantes said she had offered to do whatever he wanted with her and split the profit if he wouldn't take her back to the hospital.

13. At 3:35 a.m. Talamantes, at the jail ward, did a field test on the substance found in the balloon. It immediately tested positive for cocaine. Subject was then checked into a room, and at 4:00 a.m. DEA Agent Arthur Johnson was notified and said he would respond. At 4:10 a.m. Hernandez expelled six balloons. Both Britt and myself witnessed it. The six balloons were washed off by Hernandez, placed in an evidence bag, and initialed by both Britt and myself.

14. At 5:05 a.m. DEA Agent Johnson arrived and took a statement from us. Hernandez and evidence were then turned over to him on a chain of custody. Talamantes, Britt, and myself then departed from LAX [sic].

I declare under penalty of perjury that the foregoing is true and correct.

MARILEE S. MORGAN
/s/ Marilee S. Morgan

DECLARATION OF JEROME GONZALES

I, Jerome Gonzales, declare as follows:

1. I am an Inspector with the United States Customs and have been working at Los Angeles, California, International Airport for approximately five years.

2. At around 0830 on March 5, 1983, Customs Inspector Morgan and myself were told by Senior Customs Inspector Bissen to replace Customs Inspector Mendoza in the search room, who was sitting with passenger Hernandez. Inspector Morgan did not speak very much Spanish, so I was there to translate only.

3. I sat directly facing the search room with the door open and Inspector Morgan was facing passenger Hernandez opposite the table between them.

4. After reviewing passenger Hernandez's documents, I noticed that she had not initialed the area that shows the amount of money being returned to her. I then asked her why she did not. She felt that by doing so would give us permission to take her to the hospital, which she did not want.

5. I then asked the passenger what gave her the idea that she would be sent to the hospital. According to her, another inspector wanted her signature so that she could be taken to a hospital for an X-ray. She also said that she hardly ever goes to the hospital in her own country, why should she go to one now, now that she was in the United States. She also said that she was pregnant and did not want to harm the unborn child. I explained to her that when we do bring people back to the search room and there is any money found, that it is recorded on a form, to protect us and to make sure that all her money is returned correctly.

6. After explaining this to her, she then went ahead and initialed the section relating to the money verification only.

7. Inspector Morgan and myself had offered passenger Hernandez something to eat, which she refused. She said

that while on the flight to Los Angeles, that she had two meals. The first meal was breakfast leaving Colombia and the second meal was before arriving to the United State. Passenger was also given permission to use the restroom and again refused. Many times at home, she would not use the restroom as often at home [sic].

8. A question of her marriage was asked by me, and she said that she was married with two children [sic]. One boy was 13, one girl was 12 and a three-year old baby. Passenger produced pictures of the two oldest ones only. She said that there were none of the young one.

9. At this time, she mentioned that all of her children were born at home and not in a hospital. I then asked her how she knew she was pregnant, if she did not like going to hospitals. Her answer was that a doctor had gone to her home to give her the news. At this time, passenger produced the photos of her children.

10. I asked passenger what was the reason for her entering the United States. Her reply was to purchase goods to send home (Colombia) to a store that her husband owned interest [sic] in with a friend. I asked her what kind of merchandise she would be purchasing. She said clothes, shoes and anything in general that could be sold.

11. What stores would she be purchasing these goods from, was my next question. She said stores like K-Mart, J. C. Penney, Broadway or Sears.

12. She then showed Inspector Morgan and myself a business card with a company, "Gus Gar" or Gar Gus" appeared.

13. I then asked her if she had any appointments set up to visit any buyers, which she said "no" to; that she would take a taxi to the stores mentioned and buy right there on the spot. She also said that she did not know anyone here in the United States, but had been in the states before to purchase goods in the past.

14. At around 1400-1430, Senior Customs Inspector Bissen asked me to tell Hernandez that Customs would be sending her back to her country on the first available

flight back to Mexico City, where she could catch a flight back to Colombia.

15. Senior Customs Inspector Bissen also instructed me to ask passenger if she was married, to which she said "yes." Senior Customs Inspector Bissen asked me to ask the passenger if she had any children, to which she said "yes" and once again produced pictures and was crying. Senior Customs Inspector Bissen asked me to ask the passenger when she had purchased her ticket for the flight here, and she said it was from a travel bureau. Senior Customs Inspector Bissen asked me to ask the passenger what was the date that she purchased her ticket, and she said something not clear and then said that she could not remember. Senior Customs Inspector Bissen then asked me to ask the passenger how much currency the passenger was carrying. The passenger said she was carrying about \$5,000 in cash only.

16. Senior Customs Inspector Bissen then asked Customs Inspector Morgan to look for the passenger's luggage and to return with it to the search room. When the passenger's bags were brought to the search room, Senior Customs Inspector Bissen and Customs Inspector Morgan looked through the passenger's bags, containing a few personal pieces of clothing, like underwear, pants and blouse. There were no articles of toiletries nor any extra footwear. Also there was a photo album inside along with the clothing. It contained a few purchasing receipts and an airline airway bill which showed that merchandise had been sent to the United States before.

17. At around 1500, Customs Inspector Daunis entered the search room, and at the same time, Senior Customs Inspector Bissen instructed me to tell the passenger that another patdown would be done on her. I also told the passenger that they were doing this one more time. The passenger was willing to go through with this again.

18. After the patdown was completed, I once again entered the search room. Senior Customs Inspector Bissen told me to ask the passenger why she had some half folded paper towels placed in her underwear. The passenger said that since she was pregnant, her body was discharging fluids. That that was the reason for the paper towels placed where they were at. This is what I then told Senior Customs Inspector Bissen.

19. Inspector Daunis replaced Inspector Morgan in the search room. I also stayed for any further translations for passenger Hernandez.

20. Again Senior Customs Inspector Bissen entered the search room with instructions to tell the passenger that there would be a delay in getting her a flight out of Los Angeles, because of bad weather conditions. The passenger did not take the information too well and started to cry, saying that she did not want to stay in the states, that she wanted to go home. Senior Customs Inspector Bissen told me to tell the passenger that should there be [sic] any further cancellation of flights, that she would have to stay in the search room until Customs was able to arrange a flight for her departure. The passenger replied that she understood. Senior Customs Inspector Bissen told me to tell the passenger that she would continue to check on other flights and would return.

21. After Senior Customs Inspector Bissen left the search room, the passenger asked me if she could make a phone call home so that she could talk to her children and to let them know that everything was all right. I told the passenger that I would ask. Thereafter Senior Customs Inspector Bissen returned to the search room which [sic] and I then relayed the passenger's request. Senior Customs Inspector Bissen said "no" to the passenger's phone call.

22. The passenger then told me that if we needed to, that she would give us permission to use her money, so that we could purchase a ticket to Mexico City, which were the only flights leaving the states. Senior Customs

Inspector Bissen said "okay," that she would check once again about available flights.

23. Again I asked the passenger if she wanted anything to eat since she had not eaten in a while, and she said "no." I asked her if she wanted to use the restroom, and she said "no."

24. Senior Customs Inspector Bissen again re-entered the search room telling me to inform the passenger that she did not have a "visa" to stay in Mexico City to catch another flight home; that this would cause some problems while in Mexico. Senior Customs Inspector Bissen told me to tell the passenger that there was a late flight on Avianca going directly to Colombia at 2200, and would try to get the passenger on that flight.

25. The passenger again told me that we could use her money to purchase her a ticket. Once again I relayed this to Senior Customs Inspector Bissen.

26. At around 1600, Custom Inspector Morgan returned to the search room to replace Customs Inspector Daunis whose shift ended at 1600. Inspector Talamantes also replaced me.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 21, 1983.

/s/ Jerome Gonzales
JEROME GONZALES

DECLARATION OF TEODORA A. MENDOZA

I, Teodora A. Mendoza, declare as follows:

1. My name is Teodora A. Mendoza and I am an Inspector with United States Customs. I have had the position for approximately 7½ years, since September, 1975. On the evening of the incident, I was assigned to an overtime job at Satellite # 2, Los Angeles, California, International Airport, beginning at 5:00 p.m. until the last flight was finished. The following narrative was prepared by me on the following Monday morning, in reference to what took place on the morning of March 5, 1983.

2. On Saturday morning (March 5, 1983), at approximately 0025 hours, Avianca 080 arrived, carrying among its passengers, Ms. Montoya de Hernandez.

3. Upon a request from Inspector J. Serrato, Senior Inspector S. Ozawa and myself escorted said passenger into a search room for a pat down. Upon pressing her abdomen and stomach area, she felt hard and also as if she was wearing a girdle. I indicated for her to open her slacks and to pull them down. This revealed that she was wearing two pairs of elastic-like panties. She then pulled these down to expose a paper towel placed in the crotch area to absorb what seemed to be a vaginal discharge. I motion for her to pull her clothing back up and fasten the slacks.

4. Senior Inspector S. Ozawa counted her money and passenger had \$5041.00 as she had indicated on her Customs Form 4790 (\$5,000.00).

5. Passenger was then escorted back to the passenger belt so Inspector Serrato could explain to her, in Spanish, that she could initial the Search Report form indicating that she had received her money back.

6. Inspector Serrato then explained to the passenger that we would like to take her to the hospital for an x-ray and at first she consented. Then when Inspector Serrato and myself approached her with handcuffs and tape (for

the pant legs), she crossed her arms by her chest and began stepping backwards shaking her head negatively. When Inspector Serrato stepped forward explaining to her the necessity of the items, she looked as if she would strike him. He then stepped back and tried to convince the passenger of our motives.

7. Passenger now refused the x-ray and Supervisory Customs Inspector Hixon called Sector (Office of Investigation) to get an agent so we could try to obtain a court order.

8. A short while later, SCI Hixon returned telling us that the agent said that if the passenger wouldn't cooperate, we could "deport" her on the next plane to her country, Colombia.

9. Inspector Serrato and myself then escorted the passenger to a room where we would sit and wait until arrangements could be made for her return trip. As he was leaving, SCI Hixon found a Lacs Airline agent who said they had a flight which departed at 3:00 a.m. for Mexico with a connecting flight to Colombia, but as their flight out of Mexico was fully booked, they were unable to take said passenger since she had no visa for Mexico and could not be held there until their next flight.

10. Lacs advised us to try to book her for the following night. Passenger was informed in Spanish by Inspector Serrato of her impending "deportation" and was quite agreeable saying she would buy her return ticket if Avianca would not endorse her return ticket by their airline.

11. Passenger stayed awake all night long, refusing food, drink or toilet facilities. Passenger had been instructed that if she had to eliminate bodily wastes, she would be escorted to the female employees' restroom, but rather than use the toilet, she would have to eliminate in a waste paper basket. The purpose of this was to prevent passenger from flushing toilet before Senior Inspector Ozawa or I could prevent it and so we could see if there were any "foreign objects" in the waste material. Pas-

senger remained in chair throughout the night without speaking or causing any disruption. Most of the time the passenger sat with her legs crossed and her body shifted over to one side or the other. Passenger had also claimed pregnancy as per Inspector Serrato.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 21, 1983.

/s/ Teodora A. Mendoza
TEODORA A. MENDOZA,
Inspector #13653

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 83-215-WPG

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA E. M. DE HERNANDEZ, DEFENDANT

STIPULATION RE TRIAL AND ORDER THEREON

IT IS HEREBY STIPULATED by and between the defendant Rosa E. M. De Hernandez and plaintiff, United States of America, by and through their respective attorneys, that the following facts would be elicited through testimony by the United States in the trial of this matter and such facts are to constitute the trial record.

STEPHEN S. TROTT
United States Attorney

ROBERT L. BRODIO
Assistant United States Attorney
Chief, Criminal Division

JEFFREY S. NIESEN
Assistant United States Attorney
Attorneys for Plaintiff,
United States of America.

/s/ Janet J. Levine
JANET LEVINE,
Deputy Federal Public Defender,
Counsel for defendant,
Rosa E. M. De Hernandez.

/s/ Rosa E. M. De Hernandez
ROSA E. M. DE HERNANDEZ,
Defendant.

ORDER

IT IS SO ORDERED.

Dated: April —, 1983.

United States District Judge

III

STATEMENT OF FACTS

In the early morning of March 5, 1983, Avianca Flight #80 arrived at Los Angeles International Airport from Bogota, Colombia. Among the deplaning passengers was the defendant, Rosa E. M. De Hernancez (hereinafter Hernandez). After presenting her passport, and passing through immigration, she proceeded to Customs.

At Customs, she presented her Custom declaration and passport to Customs Inspector Talamantes. After a cursory inspection of her documents, the inspector referred her to "secondary" for a more thorough examination. At secondary, she was met and questioned by Customs Inspector J. Serrato.

Inspector Serrato inspected her passport, declaration and airline ticket. He asked her a number of questions. On the basis of her responses and general demeanor, he concluded, together with Inspector Talamantes, that Hernandez fit the profile of persons suspected of carrying drugs concealed in their bodies. The factors which led to that conclusion were as follows:

1. Hernandez was on a short trip;
2. She could not speak English;
3. She had no family or friends in the United States;
4. She was coming to buy merchandise and clothes from various shops;
5. She would visit the stores by taxi;
6. She had minimal luggage and had with her one pair of spiked heeled shoes which she wore;
7. She lacked toilet articles;
8. She carried no billfold yet had over \$5000 of currency; and
9. She came from a narcotic source country.

Inspector Serrato summoned Senior Inspector Susan Ozawa and requested a patdown search. Upon reviewing the fact, Ozawa had Hernandez escorted into a search

room. There Inspector Mendoza conducted a patdown search. Upon discovering a firmness about the pelvic area, Hernandez was told to unzip her pants. Inspection revealed two pairs of elastic panties and a paper towel in the crotch area. She was then told to get dressed. Ozawa reported to Serrato that the search was negative.

At that point Serrato asked Hernandez whether she would agree to an X-ray of her stomach. She said "yes." She also indicated she was pregnant but agreed to have a pregnancy test. After being told that she would have to be transported to the hospital in handcuffs, she withdrew her consent.

Supervisory Inspector Olinde was asked to contact the Customs Special Agents to obtain a court order for the body cavity X-ray. Contact was made with Special Agent Kyle E. Windes. After being advised by Olinde that a court order was desired, the special agent informed Olinde that current policy was not to obtain such orders. He explained the alternatives to be (a) a voluntary consent to X-ray (b) keep the passenger in custody until her bowels move and the result examined, or (c) have her depart the United States back to Colombia. Windes made no attempt to contact either the United States Attorney's Office or a Magistrate about the case.

Serrato was advised that Hernandez would be detained until she could be sent on a departing flight. He told Hernandez that she would be sent out on the next available Avianca flight and that until then she would be watched by Customs officers. He also told her that if she passed any narcotics during that period she would be arrested.

During the night, efforts were made to get Hernandez aboard a LACSA flight to Mexico with connections to Colombia. The airline refused to take her since she had no visa for a Mexico stop. Hernandez was agreeable to her "deportation" and even offered to pay for the ticket if her return ticket on Avianca was not endorsable.

Hernandez spent the remainder of the night with Serrato, Ozawa and Inspector Mendoza in the manifest room. Hernandez sat in a chair. She did not eat, drink or use the rest room. Serrato was relieved at 8:30 a.m. the next morning by Inspectors Gonzales and Morgan. It was anticipated that Hernandez would be sent back to Colombia aboard an Avianca flight due to leave that evening.

Inspectors Gonzales and Morgan continued the surveillance throughout the next day. Despite numerous requests and offers, she continued to refuse to eat, drink or use the rest room. She spoke of her family, and the reason for her visit to the United States. At 3:00 p.m. she was again pat and semi-stripped searched. This was to insure the safety of the surveilling officers. The result was again negative.

At approximately 4:00 p.m., Special Agent Windes arrived at the area where Hernandez was being detained. After being briefed, about 5:00 p.m. he contacted the United States Attorney's Office to obtain an order for an X-ray search. In support of this request, the Special Agent in addition to the other factors noted above, relied on the fact that Hernandez during the detention, failed to use the rest room, eat or drink. Also noted was Hernandez's posture in leaning in the chair she was sitting. At approximately midnight March 5, 1983, Windes spoke to Magistrate Geffen who granted an order for a pregnancy test and body cavity search.

At that point, Hernandez had been under Customs supervision and detention for about 24 hours.

At 12:30 a.m. March 6, 1983, Hernandez was escorted to USC Medical Center hospital for the medical test and examination. At about 1:30 a.m. a pregnancy test was administered and a rectal examination was performed. Dr. Lewengood, conducting the examination, removed a balloon-shaped object from her rectum. Hernandez was not pregnant.

After she dressed, Hernandez was placed under arrest and advised her of her Miranda rights. At 4:00 a.m., a

room at the hospital was obtained and DEA notified. Over the next four days, Hernandez excreted at total of 88 balloons. The balloons contained a total of 528.4 grams of 80 percent 1-cocaine, a schedule II controlled narcotic.

Late in the evening on Thursday, March 11, 1983, Hernandez was released by the doctor upon his confirmation that she had passed all the balloons. That evening she was taken to Sybil Brand Jail and the next day arraigned before Magistrate Tassopulos.

SUPREME COURT OF THE UNITED STATES

No. 84-755

UNITED STATES, PETITIONER

v.

ROSA ALVIRA MONTOYA DE HERNANDEZ

ORDER ALLOWING CERTIORARI

Filed January 21, 1985

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

Justice Powell took no part in the consideration or decision of this petition.